SUPREME COURT, U. S.
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Supreme Court of the United States

OCTOBER TERM, 1970

No. 827

HORTON & HORTON, INC.,
Petitioner,

v.

VAUGHAN MARINE, INC.,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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FIDELITY PRINTING COMPANY, INC., HOUSTON

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To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Respondent, Vaughan Marine, Inc. files this its Brief in Opposition to the Petition of Horton & Horton, Inc. for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit and would respectfully show unto the Court as follows:

REPLY TO APPLICATION FOR WRIT OF CERTIORARI

FIRST COUNTER-POINT

The United States Court of Appeals for the Fifth Circuit did not err in affirming the District Court's holding that the capsizing of the barge H&H 101, damages occasioned to its hull, loss of its cargo and the death of Joseph M. Fontenot were caused by the negligence of Horton & Horton, Inc. and the unseaworthiness of the barge H&H

101 and the negligence of the Tug CAVALIER and Vaughan Marine, Inc. in equal proportions.

SECOND COUNTER-POINT

The United States Court of Appeals for the Fifth Circuit did not err in affirming the District Court's holding that since the capsizing of the barge H&H 101, damages occasioned to its hull, loss of its cargo, and the death of Joseph M. Fontenot were caused by the negligence of Horton & Horton, Inc. and the unseaworthiness of the barge H&H 101 and the negligence of the Tug CAVALIER and Vaughan Marine, Inc. in equal proportions, damages should be divided evenly between them.

ARGUMENT AND AUTHORITIES

FIRST COUNTER-POINT RESTATED

The United States Court of Appeals for the Fifth Circuit did not err in affirming the District Court's holding that the capsizing of the barge H&H 101, damages occasioned to its hull, loss of its cargo and the death of Joseph M. Fontenot were caused by the negligence of Horton & Horton, Inc. and the unseaworthiness of the barge H&H 101 and the negligence of the Tug CAVALIER and Vaughan Marine, Inc. in equal proportions.

From a reading of the Petition for Writ of Certiorari one may get the erroneous impression that the United States Court of Appeals specifically found that the doctrines of intervening cause and last clear chance are not applicable in admiralty. This is not the case at all. The opinion of the United States Court of Appeals for the Fifth Circuit actually held that the Trial Court's findings with regard to negligence, unseaworthiness and proximate cause were not clearly erroneous. The Court stated:

> "In his written opinion the District Judge has adequately set forth the facts which establish the basis of

his findings after having had the opportunity to hear and observe the witnesses, appraise their credibility, and weigh any conflicting inferences. Unless such findings are clearly erroneous they will not be overturned. *McAllister* v. *United States*, 348 U.S. 19, 75 S.Ct. 6 (1954); *Chaney* v. *City of Galveston*, 5 Cir., 1966, 368 F.2d 774; *Grigsby* v. *Coastal Marine Service of Texas, Inc.*, 5 Cir., 1969, 412 F.2d 1011. *Questions of negligence, unseaworthiness and proximate cause are to be determined by the trier of fact* and as such are subject to the clearly erroneous rule. *Southern Stevedoring & Contract Co.* v. *Hellenic Lines, Ltd.*, 5 Cir., 1968, 388 F.2d 267, 270; *M/V ENAK* v. *Monplaisir*, 5 Cir., 1968, 391 F.2d 277, 278; *E. D. Stephens* v. *Osaka Mercantile Steamship Company*, 5 Cir., 1964, 328 F.2d 604, 605. We are unable to say that the Court's findings and conclusions are erroneous. *To the contrary, we agree with them.*" (Emphasis added.)

Proximate cause, intervening cause and last clear chance present fact questions. In addition to the cases cited by the United States Court of Appeals for the Fifth Circuit see also *The Milwaukee and St. Paul Railway Company* v. *Kellogg*, 94 U.S. 469, 24 L.Ed. 256 (1877); *Hayes* v. *Michigan Central Railroad Company*, 111 U.S. 228, 28 L.Ed. 410, 4 S.Ct. 369, (1884).

Petitioner's First Point should be disposed of by the application of the "two-court" rule as enunciated in *Berenyi* v. *Immigration Service*, 385 U.S. 630, 17 L.Ed. 2d 656, 87 S.Ct. 666 (1967). The Court at 17 L.Ed. 2d 661 stated:

> "The petitioner asks us to reject as 'clearly erroneous' the factual conclusion about his Party membership reached by the District Judge and accepted by the Court of Appeals. In order to do so, we would be forced to disregard this Court's repeated pronouncements that it 'cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error.' . . .

> The policy underlying the 'two-court' rule is obvious. This Court possesses no empirical expertise to set against the careful and reasonable conclusions of lower courts on purely factual issues. When, as here, resolution of the disputed factual issues turns largely on an assessment of the relative credibility of witnesses whose testimonial demeanor was observed only by the trial court, the rule has particular force."

The Trial Court found that the negligence of Horton & Horton, Inc. and the unseaworthiness of the Barge H&H 101 contributed to cause the capsizing of the Barge H&H 101 and the death of Joseph Fontenot and that such negligence was "in equal proportions" to the negligence of Vaughan Marine, Inc. and the Tug CAVALIER. It is respectfully submitted that this fact issue has been found by "two courts" below and there is nothing in the record of this case to indicate that those findings were clearly erroneous.

SECOND COUNTER-POINT RESTATED

The United States Court of Appeals for the Fifth Circuit did not err in affirming the District Court's holding that since the capsizing of the barge H&H 101, damages occasioned to its hull, loss of its cargo, and the death of Joseph M. Fontenot were caused by the negligence of Horton & Horton, Inc. and the unseaworthiness of the barge H&H 101 and the negligence of the Tug CAVALIER and Vaughan Marine, Inc. in equal proportions, damages should be divided evenly between them.

Once again a reading of the Petition for Writ of Certiorari would indicate that the United States Court of Appeals for the Fifth Circuit as well as the United States District Court for the Southern District of Texas have overruled *Halcyon Lines* v. *Haenn Ship Ceiling & Refitting Corporation*, 342 U.S. 282, 96 L.Ed. 318, 72 S.Ct. 277, 1952

A.M.C. 1 (1952). The result and holding of *Halcyon* (supra) is completely logical and correct and has not been disturbed by either of the courts below. It of course would be illogical to grant a ship repairer tort immunity in lieu of its obligation to its employees under the Longshoremen's and Harbor Workers' Compensation Act and revisit tort liability upon it by allowing a division of damages in a situation where one of its employees sued the ship upon which he was injured and the ship in turn impleaded the party to whom tort immunity had been granted by statute. All that the United States Court of Appeals for the Fifth Circuit has done is hold that Horton & Horton, Inc. was neither statutorily, nor by operation of law, immune from tort liability and consequently the *Halcyon* (supra) doctrine has no application in this case.

CONCLUSION AND PRAYER

In the event this Court is of the opinion that *Halcyon* (supra) bars contribution in this case, the Respondent respectfully submits that the Court should direct that the United States Court of Appeals for the Fifth Circuit's Opinion be modified to provide that Vaughan Marine, Inc. recover FORTY-FIVE THOUSAND AND NO/100 DOLLARS ($45,000.00), of and from Horton & Horton, Inc., since Horton & Horton, Inc. has actually received contribution from Vaughan Marine, Inc. for the damages arising out of the death of Joseph Fontenot.

Two courts have reviewed the evidence in this case and have found as a matter of fact that the negligence of Horton & Horton, Inc. and the unseaworthiness of the Barge H&H 101 were contributing proximate causes of the death of Joseph Fontenot and that the fault of Horton & Horton, Inc. had not come to rest or been superseded by the fault of Vaughan Marine, Inc. at the time of the casualty. The evidence in this case clearly supports these conclusions and they are certainly not clearly erroneous.

The United States Court of Appeals for the Fifth Circuit did not err in holding that *Halcyon* (supra) does not preclude contribution in this case.

WHEREFORE, Respondent prays that the United States Court of Appeals be in all things affirmed and that the Petition for Writ of Certiorari be denied, or in the alternative, in the event the Petition for Writ of Certiorari be granted, this case be remanded to the United States Court of Appeals for the Fifth Circuit with instructions to modify its Opinion to provide for a FORTY-FIVE THOUSAND AND NO/100 DOLLARS ($45,000.00) recovery by Vaughan Marine, Inc. against Horton & Horton, Inc.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that three copies of the above Brief in Opposition to Petition for Writ of Certiorari were served upon Robert Eikel, Esq., Counsel for the Petitioner, by delivering same to his office at 205 Oil & Gas Building, Houston, Texas, the 3rd day of December, 1970.

THOMAS A. BROWN, JR.